

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

In the Matter of

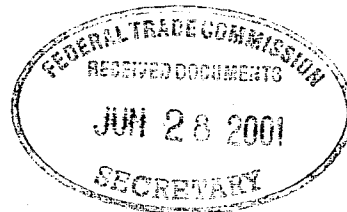
SCHERING-PLOUGH CORPORATION,  
a corporation,

UPSHER-SMITH LABORATORIES, INC.,  
a corporation,

and

AMERICAN HOME PRODUCTS  
CORPORATION,  
a corporation.

Docket No. 9297



COMPLAINT COUNSEL'S MOTION FOR THE ISSUANCE OF A SUBPOENA *DUCES*  
*TECUM* TO .....  
(PUBLIC RECORD)

Pursuant to Rule 3.36 of the Federal Trade Commission's Rules of Practice, complaint counsel moves for an Order authorizing the issuance of a subpoena *duces tecum* to ..... Complaint counsel has contacted ....., and while he is outside the Federal Trade Commission's jurisdiction, he has nonetheless agreed to accept service of process of the subpoena *duces tecum*. Respondents American Home Products, Schering-Plough Corporation, and Upsher-Smith Laboratories have indicated that they do not oppose the issuance of the requested subpoena.

## **BACKGROUND**

Upsher-Smith Laboratories contracted with the ..... in early 1997 for assistance in attempting to identify European companies that might have an interest in marketing Upsher-Smith's Niacor SR product. The relationship between the ..... and Upsher-Smith lasted for several months, and during that time the ..... contacted a number of pharmaceutical companies with a European presence and facilitated meetings between Upsher-Smith and four of those companies to discuss Upsher's Niacor SR product. We expect ..... documents to speak to the these other pharmaceutical companies' evaluation of the Niacor SR product.

## **ARGUMENT**

**The Subpoena *duces tecum* should be ordered, because it meets all requirements necessary under the Federal Trade Commission's Rules of Practice.**

The Commission's new Rule 3.36 requires that any subpoena served abroad must meet the following requirements: (1) the material sought is reasonable in scope, (2) the material falls within the limits of Section 3.31(b) - that is, the material is reasonably relevant, and (3) the information or material sought cannot reasonably be obtained by other means. Complaint counsel's subpoena *duces tecum* meets all three requirements.

The information complaint counsel seeks falls within three narrow categories: (1) communications between ..... and employees of Upsher-Smith Laboratories concerning marketing Niacor SR in Europe; (2) communications between ..... and other companies or individuals concerning marketing Niacor SR in Europe, and (3) any documents created by .....

..... concerning Upsher-Smith's Niacor SR product.<sup>1</sup> The subpoena duces tecum is thus reasonable in scope. These categories also go to one of the central and contested issues in the case – whether the payment by Schering to Upsher-Smith was for fair value for the Niacor license. In assessing each side's factual assertions, the assessment of the marketing potential for Niacor SR by other European pharmaceutical companies and Schering's subsidiaries in Europe is clearly relevant information.

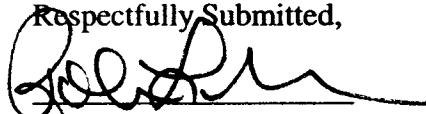
In addition, the information sought cannot be obtained through other means. During the investigative phase of this matter, FTC staff received from Upsher-Smith some documents sent to Upsher-Smith by ..... However, it is far from clear that Upsher-Smith's production includes the same universe of documents contained in ..... files. ...., who acted as the facilitator between Upsher-Smith and various European pharmaceutical companies on the Niacor SR project, is the individual who is likely to have the most complete files on this issue.

### CONCLUSION

For the foregoing reasons, complaint counsel respectfully requests that its motion be granted in all respects.

Dated: June 22, 2001

Respectfully Submitted,



Karen G. Bokat  
Robin L. Moore  
Complaint Counsel

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<sup>1</sup> Complaint counsel has apprized ..... of the scope of documents it intends to subpoena.

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Docket No. 9297

**DECLARATION OF ROBIN L. MOORE  
(Public Record)**

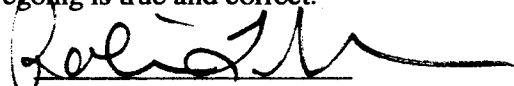
Robin L. Moore declares as follows, pursuant to 28 U.S.C. § 1746:

1. I am an attorney employed by the Federal Trade Commission and am counsel supporting the complaint in this matter. I submit this declaration to: (1) place before the Court a schedule of those documents complaint counsel seeks to obtain from the ..... , (2) to apprise the Court that Respondents American Home Products, Schering-Plough Corporation, and Upsher-Smith Laboratories do not oppose the issuance of the requested subpoena, and (3) to apprise the Court that ....., while outside the jurisdiction of the FTC, has voluntarily agreed to accept service of process.

2. Annexed hereto as Exhibit A is a copy of "Attachment," which identifies those documents complaint counsel seeks from the .....

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Washington, D.C. on June 25, 2001

  
Robin L. Moore

# EXHIBIT A

(Public Record)

## **ATTACHMENT**

### **SUBPOENA DUCES TECUM ISSUED TO:**

.....

### **SPECIFICATIONS**

In accordance with the instructions and definitions below, submit the following:

- SPECIFICATION 1: All documents relating to communications between ..... and employees of Upsher-Smith Laboratories concerning marketing Niacor SR in Europe.
- SPECIFICATION 2: All documents relating to communications between ..... and any company or individual other than Upsher-Smith Laboratories concerning Niacor SR.
- SPECIFICATION 3: All documents created by ..... concerning Upsher-Smith's Niacor SR product.

## CERTIFICATE OF SERVICE

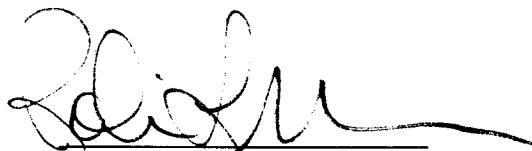
I, Robin L. Moore, hereby certify that on June 28, 2001, I caused a copy of the Public Record version of Complaint Counsel's Public Motion for the Issuance of a Subpoena *Duces Tecum* to be served upon the following persons by hand delivery or by Federal Express and facsimile.

Hon. D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
Room 104  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Cathy Hoffman, Esq.  
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555 Twelfth Street, N.W.  
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White & Case LLP  
601 13th Street, N.W.  
Washington, D.C. 20005

A handwritten signature in black ink, appearing to read 'Robin L. Moore', written over a horizontal line.

Robin L. Moore  
Complaint Counsel